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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

11 VOLUME SERVICES INC, No. C-13-02318 YGR (DMR)  
12 Plaintiff, **ORDER ON JOINT DISCO**  
13 v. **LETTERS [DOCKET NOS.**

14 UNITE HERE,  
15 Defendant.

**ORDER ON JOINT DISCOVERY  
LETTERS [DOCKET NOS. 36 and 45]**

17 Plaintiff Volume Services, Inc. dba Centerplate (“Centerplate”) and Defendant UNITE  
18 HERE! Local 2 (“Local 2” or “the union”) filed a joint discovery letter in which Local 2 asks the  
19 court to modify the stipulated protective order entered in this case. [Docket No. 36 (Joint Letter).]  
20 The court held a hearing on January 9, 2014. Pursuant to the court’s order, the parties filed a second  
21 joint letter on January 14, 2014 in which they set forth the agreements reached regarding this  
22 dispute, as well as the issues remaining for determination by the court. [Docket No. 45 (Second  
23 Joint Letter).] The court now enters the following order on the parties’ joint letters.

## I. Discussion

25 Centerplate is a vendor that contracts with the San Francisco Giants (“the Giants”), a non-  
26 party major league baseball team. Centerplate provides concession services at AT&T Park, the  
27 Giants’ home field. Local 2 represents Centerplate’s concession-stand employees. Centerplate and  
28 Local 2 have been actively involved in collective bargaining negotiations since March 2013.

1 Against this backdrop, Centerplate filed the current action. The main issue in this lawsuit is whether  
2 Local 2's one-day strike on May 25, 2013 and intermittent picketing at AT&T Park were for  
3 unlawful purposes. Centerplate alleges that Local 2 conducted those activities to, *inter alia*, force  
4 Centerplate and the Giants to enter into an illegal agreement, the "Successorship Addendum," in  
5 violation of Sections 8(b)(4)(A) and 8(e) of the Labor Management Relations Act (LMRA), 29  
6 U.S.C. §§ 158(b)(4)(A), 158(e). Centerplate also alleges that Local 2 is engaged in a campaign to  
7 threaten and coerce Centerplate into ending its business relationships with certain non-profit  
8 organizations (NPOs) in violation of Section 8(b)(4) of the LMRA, 29 U.S.C. §§ 158(b)(4).

9 Centerplate seeks discovery regarding Local 2's bargaining proposals, negotiations, and  
10 picketing-related activity, arguing that such information is relevant to its claims pursuant to *Frito-*  
11 *Lay, Inc. v. Local Union No. 137*, 623 F.2d 1354, 1362-63 (9th Cir. 1980). In *Frito-Lay*, the Ninth  
12 Circuit held that in order for an employer to recover damages for an unlawful strike, an "illegal  
13 object [need not] be the sole cause of [a] strike"; "it [need only] be a 'substantial' cause" or  
14 "'materially contribute' to the injury, 'notwithstanding other factors contributed also.'" *Id.* (citing  
15 *Mead v. Retail Clerks Local 839*, 523 F.2d 1371, 1376-77 (9th Cir. 1975)).

16 Local 2 does not dispute the relevance of discovery regarding the purpose and goals of strike  
17 and picketing activity, nor does it argue that such discovery should be completely barred. Instead, it  
18 urges the court to recognize a "collective bargaining privilege" and modify the protective order to  
19 limit Centerplate's right to discover information about its bargaining strategy. Local 2 cites  
20 numerous National Labor Relations Board ("NLRB" or "Board") decisions in which the Board  
21 protected such information from disclosure. (Joint Letter 2-3.) Local 2 argues that forcing the union  
22 to reveal its bargaining strategy would be severely prejudicial to its bargaining position, citing  
23 *Berbiglia, Inc.*, 233 NLRB 1476, 1495 (1977). In *Berbiglia*, the Board noted that "[i]f collective  
24 bargaining is to work, the parties must be able to formulate their positions and devise their strategies  
25 without fear of exposure." *See also Harvey's Wagon Wheel, Inc. v. NLRB*, 550 F.2d 1139, 1143 (9th  
26 Cir. 1976) (holding that FOIA exemption applied to NLRB-collected employee affidavits, noting  
27 that such statements should "normally be protected from disclosure as a matter of law. Otherwise,  
28 the danger of their withholding relevant information for fear of exposing crucial material regarding

1 pending union negotiations would be manifest.”). Local 2 notes that the parties convene for  
 2 collective bargaining negotiations approximately once a month, and that many central issues remain  
 3 unresolved, including wages, healthcare, and job security. (Joint Letter 1.)

4 At the January 9, 2014 hearing, the court noted that the authority cited by Local 2 does not  
 5 support the existence of a collective bargaining privilege under federal law.<sup>1</sup> If no such privilege  
 6 exists, then information about Local 2’s bargaining positions is not exempt from disclosure if it is  
 7 otherwise relevant. Nevertheless, the court recognizes the important concerns expressed in *Harvey*  
 8 and the Board decisions: when an employer and a union are engaged in collective bargaining,  
 9 discovery by the employer into its opponent’s negotiation plans would severely prejudice the  
 10 union’s ability to bargain effectively. For this reason, when crafting the scope of relevant discovery  
 11 under such circumstances, the court should exercise particular caution and care in balancing the  
 12 competing concerns. A court should permit discovery that is relevant to the claims or defenses at  
 13 issue, but with appropriate limits so as not to unduly jeopardize the union’s bargaining ability.

14 Following the hearing, the court ordered the parties to meet and confer to define the scope of  
 15 discovery in light of the court’s rulings. The court also ordered the parties to appear again later that  
 16 day to place any agreements on the record and to argue any remaining disputes. Upon reconvening,  
 17 the court determined that counsel had failed to comply with the court’s instructions. The court  
 18 ordered the parties to resume discussions and to submit a joint letter by January 10, 2014 setting  
 19 forth all agreements the parties had reached and stating their respective positions regarding any  
 20 remaining disputes. The parties submitted a joint letter on January 10, 2014, which the court struck  
 21 for failure to comply with the court’s order. [Docket No. 44.]

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24 <sup>1</sup> Federal Rule of Evidence 501 provides federal courts with “the flexibility to develop rules of  
 25 privilege on a case-by-case basis.” *Trammel v. U.S.*, 445 U.S. 40, 47 (1980). However, the federal  
 26 “policy favoring open discovery requires that privileges must be ‘strictly construed.’” *Dowling v. Am.  
 27 Haw. Cruises, Inc.*, 971 F.2d 423, 425 (9th Cir. 1992) (quoting *Univ. of Pa. v. EEOC*, 493 U.S. 182, 189  
 28 (1990)). The Supreme Court has cautioned courts not to exercise the authority granted by Federal Rule  
 of Evidence 501 “expansively,” particularly where “it appears that Congress has considered the relevant  
 competing concerns but has not provided the privilege itself.” *Univ. of Pa.*, 493 U.S. at 189. No court  
 has recognized a collective bargaining privilege under federal law. *See NLRB v. Jackson Hosp. Corp.*,  
 257 F.R.D. 302, 314 (D.D.C. 2009) (holding “there is no authority adopting any privilege for bargaining  
 strategy in federal courts”).

1       On January 14, 2014, the parties submitted another joint letter in which they set forth certain  
2 agreements they had reached, as well as their positions regarding two remaining disputes. (Second  
3 Joint Letter.) The disputes are 1) “[w]hether pre-trial discovery may be taken as far as what are the  
4 ‘bottom line’ positions of either party with respect to any particular contract proposals or bargaining  
5 demands, i.e., whether the party is willing to amend, modify, or withdraw a particular demand,”  
6 including demands regarding the Successorship Addendum and proposals regarding NPOs, and 2)  
7 “[w]hether Union witnesses and participants in union bargaining caucuses or private meetings with  
8 employees can be asked about who said what in these meetings” regarding the union’s bargaining  
9 strategy with respect to the Successorship Addendum and NPO proposals, as well as discovery into  
10 who else was present at the meetings. (Second Joint Letter 2.)

11       With respect to the first dispute, Centerplate is indeed entitled to ask the union about its  
12 “bottom line” bargaining positions regarding the Successorship Addendum and NPO proposals. In  
13 other words, Centerplate may ask what are essentially “yes or no” questions about whether Local 2  
14 is willing to amend, modify, or withdraw its demands on those two subjects. However, Centerplate  
15 may not ask for details about bargaining demands or proposals regarding those subjects. With  
16 respect to the second dispute, Centerplate may ask witnesses about what union officers and members  
17 of the bargaining team said regarding the Successorship Addendum and NPO proposals, as long as  
18 the questioning is consistent with the scope of discovery on these topics as set forth above.  
19 Centerplate may not ask about statements made by other union members (that is, individuals who are  
20 not officers or members of the bargaining team) regarding bargaining on any issues. Since such  
21 individuals are not empowered to take positions on behalf of the union, there is no legitimate  
22 purpose in asking about what they said. In addition, Centerplate may ascertain which union officers  
23 and members of the bargaining team were present at bargaining caucuses and private meetings with  
24 employees, but may not seek the identity of other union members present at such meetings.<sup>2</sup> This  
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27       <sup>2</sup> The parties also made certain agreements limiting Centerplate’s deposition questioning to the  
28 extent the court permits discovery as to the two disputed areas. (See Second Joint Letter 2-3.) The court  
hereby adopts and orders those five limitations here.

1 ruling is made without prejudice to Centerplate's renewing its request for permission to seek such  
2 information upon a showing of good cause, as stated at the hearing.

3 **II. Conclusion**

4 For the foregoing reasons, Centerplate may take limited discovery as to Local 2's bargaining  
5 positions in conformance with this order.

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7 IT IS SO ORDERED.

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9 Dated: January 28, 2014

